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ABSTRACT

Cases related to school policies that mandate or lead to automatic grade and/or credit reduction are reviewed in this study. Standard legal research methods were used to analyze 14 appellate and state court cases, which were categorized according to the type of sanction invoked: student suspension for violation of a disciplinary rule; automatic loss of grade points and/or credits for excessive absences; and direct treatment of unexcused absences. Findings indicate that courts are hesitant to intervene in the judgments of school officials, despite sympathy for students' rights. Recommendations for development of school discipline policies include: (1) recognition of the controversial nature of such discipline policies; (2) adoption of a policy statement that clarifies the meaning of academic grades; (3) avoidance of conflict with state statutes, particularly those protecting the practice of religious beliefs; and (4) consideration of legislative enactments and/or local school board regulation as alternative measures. (48 notes) (LMI)

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THE IMPOSITION OF AUTOMATIC GRADE AND CREDIT REDUCTIONS FOR VIOLATIONS OF SCHOOL ATTENDANCE AND DISCIPLINARY RULES: ANALYSIS AND IMPLICATIONS FOR PRACTICE

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AUTOMATIC GRADE AND CREDIT REDUCTIONS

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INTRODUCTION

Problems associated with student discipline and truancy have been a major issue in the management of public schools for many years. Since 1969 the Gallup Poll has annually solicited public opinion regarding our nation's schools. One question which has been asked in each of the surveys is: "What do you think are the biggest problems with which the public schools in this community must deal?" In 16 out of 21 years, the number one problem identified was a "Lack of Discipline." During the 1980s the concern over discipline maintained a first-place rating until 1986 when the issue of the "Use of Drugs" superseded it. However, "Lack of Discipline" remained a critical concern being identified as the second biggest problem in the last four surveys. In addition, throughout the 1980s "Pupils Lack of Interest/ Truancy" has also been consistently viewed as one of the top ten problems.[1]

Over the years numerous techniques have been devised to deal with the lack of discipline and truancy. One such procedure which many schools adopted is the imposition of automatic grade and credit reductions for truancy and infractions of school rules. During the latter part of the 1970s and throughout the 1980s the legality of this practice was seriously questioned. For the first time in American judicial history, appellate courts were called upon to examine the specific question of whether or not a public school district should be permitted to impose grade and credit reductions for violations of school attendance and disciplinary rules. During the past 15 years the appellate courts of nine different states plus three federal courts gave consideration to this issue. It should

be noted that poor attendance and the violation of school rules particularly those resulting in suspension or expulsion will often have a natural negative impact on grades. However, the cases reviewed in this study relate to school policies that mandate or have the effect of automatically reducing grades and/or credit.

Of the 14 cases identified, the courts clearly ruled in favor of the student(s) on five occasions, supported the action of the school district seven times, threw one case out as a frivolous insubstantial federal question insufficient to establish jurisdiction, and remanded back one case to the trial court for further examination of the policy and procedural remedies governing the question.

Although numbers alone would suggest an apparent lack of judicial consensus about the appropriateness of such policies, some predictable trends are beginning to emerge. And given the number of cases, jurisdictions, and the time frame involved, it is now possible to recommend some useful guidelines and suggestions to assist the thoughtful practitioner.

METHODOLOGY

Standard legal research methods were employed in locating case materials. The search initially began with the Century and Decennial Digests of the American Digest System. A comprehensive search of all keys numbers (148-178) related to pupils under the topic of Schools and School Districts was undertaken. Eleven of those key numbers helped produce cases on point. Those key numbers included 160 Compulsory Attendance, 161 Truants, 162 School Terms, Vacations, and Holidays, 163 Grades or Classes, 164 Curriculum and Course of Study, 169 Control of Pupils and Discipline in

General, 170 Rules and Regulations, 173 Violation of Rules and Offenses, 174 Punishment, 175 Punishment in General, and 177 Expulsion or Suspension. A cross check was made with every applicable case to identify additional key numbers under the topic of Schools and School Districts not listed above. None were discovered.

Appropriate and related topics in American Law Reports, the Index to Legal Periodicals, Corpus Juris Secundum, American Jurisprudence 2d, School Law related looseleaf services, and treatises were also reviewed with the intent of identifying any additional cases not found within the search of the Digest System.

The history and subsequent treatment of all cases found and utilized in the investigation were traced through the use of Shepard's Citations.

COMMON THEMES

An examination of the school policies or rules considered by the courts allowed for a natural grouping of the cases into three categories. Group one, consisting of five cases, was characterized by the student initially having violated some disciplinary rule such as fighting, drinking, drug abuse, habitual truancy, etc. Following established school procedures, the student was then suspended from school. In two of those cases the student was suspended for the remainder of the term and automatically lost all academic credit for that particular attendance period. In a third case the student received an automatic two percentage point reduction in grade for each day of the suspension. The suspension of another student came during the week of mid-term examinations. School policy did not allow him to take the tests nor to make up the examinations. As a result, his grades were lowered. In the final case, the policy of the district treated an absence

due to suspension as an unexcused absence. Such absences, according to district rules, required automatic grade penalties which could not be made up.

The second category, of which there were three cases, involved policies which mandated an automatic loss of grade points and/or credit for excessive absences. The number of absences deemed excessive varied anywhere from seven to twelve during a typical grading period.

The third and final category included six cases, all of which pertained to the direct treatment of an unexcused absence. In two of the cases, the school policy provided an automatic grade reduction for each unexcused absence. Two other cases involved policies which required a 3% reduction in grade for each unexcused absence. Of the final two cases, one pertained to a policy which required unexcused students be given a zero for the day. The last case dealt with a music class regulation that mandated an automatic failing grade to any student who was unexcused and missed a scheduled concert presentation.

Interestingly enough, neither the student nor the school district prevailed in any one of the categories. Thus a closer examination of the individual cases and the legal theories upon which each was argued is necessary in order to better understand the conclusions upon which the guidelines for practice were developed.

CASES OF CATEGORY I

BREACH OF DISCIPLINARY CODE - SUSPENSION

ACADEMIC PENALIZATION

A 15 year old female New York high school student was recorded as having been absent 25 days of the school year. In addition, school records indicated that during the days she was present at school, she had skipped attending her social studies class an additional 23 times. School officials had sent notices home and had held conferences with the student and parent. The case finally came to a point where school officials, with the consent of the student and parent, agreed that only one more chance would be given and that if the student "cut" her social studies class one more time, she would be removed from the class, not permitted to take the final examination, and be given an automatic failing grade. She failed to attend the course an additional time, and the agreed upon action was taken.

The student and parent sought and gained relief through the state court system. The appellate court ruled as matter of law that the student was a truant.[2] Having established this point, the court then turned to state law which prescribed the manner in which school officials were to deal with truancy offenders. Those provisions required that the offender be arrested and that a proceeding against them be instituted in the County Family Court. The court found no state law supporting the school's right to suspend or remove a student for reason of truancy. It was pointed out, however, that the district did have the right to suspend students behaving in other stipulated ways. As to the agreement that had been wrought between the parties, the court ruled that: "The local

school authorities and these petitioners could not validly contract to subvert the State's public policy as such as expressed in the compulsory education statutes nor could petitioners effectively waive the performance by school authorities of their statutory duty to enforce that policy. Accordingly, the said agreement is not an effective defense to their proceeding."[3]

The case of Fisher v. Burkburnett Independent School District[4] involved another 15 year old high school student. In this particular instance, however, the case came from the state of Texas. The student, who seriously overdosed on the drug Elavil while at school, was suspended for 10 days for violating a school drug policy. On the last day of the suspension, a hearing was held before the school board resulting in expulsion for the balance of the term and a loss of all letter grades and credit for the term.

The student's court defense was based on three issues: First, that the school board's drug regulation exceeded a state statutory grant of power; Second, that the alleged mandatory nature of the punishment under the regulation in question deprived her of procedural due process protections; and Finally, that the punishment she had received was arbitrary and capricious and thus in violation of substantive due process.

With respect to the first issue, the student relied on a Texas Statute which authorized the use of suspension only in cases involving incorrigible students.[5] She pointed out to the court that the use of incorrigible in this statute denoted more than a single instance of misbehaving and that since this was her first offense, suspension was an inappropriate penalty. The court declined to follow the student's line of thinking relying on another statute which read that "the trustees may adopt such rules, regulations, and

by-laws as they deem proper"[6] and holding that this provision provided an independent grant of authority for school boards to promulgate disciplinary rules and, by necessary implication, to punish students for infractions of these regulations.

The procedural due process issue hung on the language of the regulation that read, "Any student known to have a dangerous or narcotic drug in his possession or known to be under the influence thereof, while in school, or participating in or attending a school sponsored function, shall (emphasis added) be expelled for the balance of the semester and no credits or grades given to the student for the semester."[7] Specifically, the student contended that the action was mandatory thus forcing the board to abdicate its responsibility to exercise proper discretion. The court found that while the regulation in question was literally mandatory in its use of the word "shall," the school board had the inherent authority to ignore this mandatory language and impose lesser penalties. The record of the hearing showed that the appropriateness of the punishment was discussed and developed. Furthermore, the court declared, "Nothing in the due process clause prohibits the establishment of presumptively correct punishments for breaches of school discipline."[8] As to the substantive due process question, the court as a matter of law simply ruled that the penalty in light of the circumstances was not unreasonable.

The third case[9] in this category involved a Pennsylvania high school student who in violation of her school's alcohol policy drank a glass of wine in a restaurant while on a field trip with her Humanities class. She was suspended and excluded from class for 5 days, expelled from the cheerleading squad, prohibited from taking part in school activities during the 5 days of suspension, and later permanently expelled from the

National Honor Society. Under the district's disciplinary policy, a further penalty of grade reduction was imposed. This latter policy read as follows: "Reduce grades in all classes two percentage points for each day of suspension. The grades are to be reduced during the marking period when the inschool or out of school suspension occurred. In lieu of a two percentage point reduction, the student may be assigned to a supervised Saturday work program provided the parent(s) and student accept the conditions of this option."[10] The Saturday work program was not available in this instance, however, because of an additional provision which read that the program wouldn't be available to students that violate the district policies on smoking, drug, and alcohol abuse.

The student was a high achiever, ranking 10th in a class of 600, and had no record of disciplinary problems or prior offenses of any kind. She raised no procedural issues nor did she contest any penalties imposed except the propriety of the reduction in grades as punishment for her disciplinary infraction. The Common Pleas Court ruled in favor of the student on grounds that the Board's policy was in conflict with a State Board of Education policy on Student Rights and Responsibilities which read: "Students shall be permitted to make up exams and work missed while being disciplined by temporary or full suspension within guidelines established by the board of school directors."[11]

On appeal, the school board contended that local school districts have an inherent right to determine the nature of discipline to be administered to students violating their codes of behavior and that the State Board provision doesn't place a limitation on that right. The board in establishing its case pointed to a state law empowering local boards of education to "adopt and enforce such reasonable rules and regulations as (they) may

deem necessary and proper."[12] The Commonwealth Court acknowledged the legislative authority that had been given to local school districts to suspend, but went on to declare,

> We cannot conclude that the legislature in authorizing adoption and enforcement of reasonable rules and regulations intended to sanction a grade reduction policy without an optional make up program for the kind of infraction involved here. We believe. . .that the policy and the penalty here goes beyond the scope of making up for time lost, such as the five day suspension. Here, rather, although the penalty was for the five days missed, the assessed penalty down-graded achievement for a full marking period of 9 weeks. Of course, for college entrance and other purposes this would result in a clear misrepresentation of the student's scholastic achievement. MISREPRESENTATION OF ACHIEVEMENT (emphasis added) is equally improper, and we think legally improper whether the achievement is misrepresentative by upgrading or by downgrading, if either is done for reasons that are irrelevant to the achievement being graded. For example, one would hardly deem acceptable an upgrading in a mathematics course for achievement on the playing field. In this connection, we find inapt appellant's example of downgrading for cheating. Cheating is related to grading. We conclude, for the reasons stated, that the Board's policy and the manner in which it was exercised in this case represents an illegal application of the Board's discretion, and that therefore, as the trial court held, the grade reduction was improper.[13]

In Donaldson v. Board of Education for Danville,[14] an Illinois junior high school student got into a fight on campus with another boy. The other boy was corporally punished for his part in the infraction as would have been the student in question had it not been for his parents having signed a voluntary statement opposing such punishment. As an alternative he was suspended for 3 days. Due to natural timing, the suspension came on the days of the school's early October examination period. Since absence due to suspension was considered by the school as unexcused, he was not allowed to make

up the exams and other work missed during that time. As a result, his grades were lowered. A hearing upheld the suspension.

The student's legal challenge conceded the fact that although this was his first infraction of the school's disciplinary code that his behavior was punishable. However, he argued that some other form of available disciplinary action which would have been less disruptive of his education, should have been employed. Thus, he attacked the propriety of the decision to suspend him for 3 days. Both the trial and the appeals court dismissed the student's petition as being insufficient to state a cause of action. Specifically, the appeals court noted that school discipline is an area which courts hesitantly enter conceding that school officials are much better trained and in a better position to make judgment and that courts should only overturn such actions if done in a clearly arbitrary, unreasonable, capricious, or oppressive manner. In the instant case, the court felt it unfortunate that the suspension fell on the days of the exams but not unreasonable and that the results weren't terribly harmful. On this latter point, the court noted that the grades given a 7th grader weren't generally viewed as important as those in high school vis a vis employment, college entrance, etc.

The final case[15] in this category involved two Texas students who consumed alcohol on a school sponsored trip. They were suspended for three days. In addition, each student received zeros on all graded work for each day of the 3 day suspension as well as having three grade points deducted for each day of the suspension from their 6 week grade average then accruing. The action was contested on the following grounds: (1) The penalty was not based on established policy; (2) There was a lack of information

on any alleged policy; and (3) The practice of reducing grades for nonacademic disciplinary reasons was constitutionally unreasonable, impermissible, and deprived students of protected property rights and substantive due process.

A pivotal issue in the case revolved around the question of whether or not the district had a valid policy upon which to base its action. There was no dispute over the fact that the district had a policy on alcohol abuse or that suspension was an appropriate form of discipline. The problem related to the fact that the alcohol policy did not specify that the days of suspension would be treated as unexcused absences or truancy. It was in policies relating to unexcused absences and truancy that the added penalties of grade reduction were found. These policies read as follows:

> Unexcused Absences - those absences approved by the parent for the convenience of the student but not approved by the school. The student is penalized 3 points for his 6 weeks grade average for each day absence. Work may not be made up.
> Truancy - cutting school all or part of a day without approval of either parents or school. The student is penalized three points for his 6 weeks average plus being given a '0' for the day's work. In addition, the student is not permitted to make up missed work. Additional punishment can be given.[16]

The school district mounted strong evidence that added consequences for violating the alcohol regulation was presented orally in assemblies where the affected students were present. The court in weighing the evidence held that the policy could be informal and given orally so long as it fairly apprised students. It further concluded that adequate notice had been given in the case at hand.

On the third issue, the court upheld the notion that a student has a constitutionally protected property right to a public education and a liberty interest in his or her good

name. The court also held as a matter of law that the reduction of a student's six-week grade by three points for each day of suspension had no adverse impact on his property rights to a public education. Furthermore, the court found that the evidence did not demonstrate that the imposition of the scholastic penalties had had any negative impact on the honor, reputation, or name of the students.

CASES OF CATEGORY II

EXCESSIVE ABSENCES - ACADEMIC PENALIZATION

In Gutierrez v. School District R-1,[17] a Colorado school district had adopted a policy which denied academic credit to any student who was absent seven or more times in a semester. According to the regulations, the 7 days of absence were to accommodate the following: (1) personal illness, (2) professional appointments that could not be scheduled outside the regular school day, (3) serious personal or family problems, and (4) any other reason. The policy was developed pursuant to a state statute authorizing a school board "to adopt written policies, rules, and regulations, not inconsistent with law, which may relate to the study, discipline, conduct, safety, and welfare of all pupils. . ."[18]

The complaining students charged that the policy was inconsistent with law. They pointed to a section of the State School Attendance Law[19] which required students to attend school at least 172 days during the school year, but which specifically noted that days on which a student is "temporarily ill or injured" or "has been suspended or expelled" are counted as part of the 172 mandatory attendance days. The students claimed that this statute disclosed a legislative policy that nonattendance sanctions not be imposed

for these types of absences. The courts agreed; and as a result, found the denial of academic credit as based on the local board's attendance policy to be beyond the scope of their authority.

The second case[20] in this category involved a 16 year old Arkansas sophomore high school student who was expelled from school and denied academic credit for his classes. The case was based upon the following policy:

> Attendance: A pupil is expected to attend every day of school and to attend every class to which he is assigned during each day of school. An account must be made of each instance wherein a pupil fails to meet this expectation. A pupil may miss no more than 12 days per semester excused or unexcused from any class and receive credit for course work. Excessive absenteeism is sufficient grounds for expulsion of any pupil. Excessive absenteeism shall be defined as failure to attend school a sufficient number of days to be eligible for credit in course work.[21]

The student in this case had missed four full days of school. In addition, he had missed a physical science class, which he claimed he could not understand, ten additional times. He was subsequently expelled and denied credit in all of his courses. In court, he argued that the rules meant that he had to miss school a total of 12 days without attending any classes before he could be expelled and lose academic credit. Thus, his substantive legal claim was that the school board failed to follow its own rules and that the rules were vague, indefinite, unreasonable, and therefore unconstitutional.

Without any real development of rationale, the court's majority simply declared:

> We cannot say that the school rules or their interpretation by school authorities are unconstitutionally vague or indefinite. . . . The decision to dismiss Williams was one within the power of the board. This court does not have the power to substitute its judgment for that of such a board. We can only

> determine whether the judgment was arbitrary, capricious, or contrary to law. We cannot so find in this case.[22]

There was a strong dissenting opinion[23] which took the position that the student had both a Constitutional and statutory right to attend school and that there was no policy which clearly supported the proposition that if a student missed 12 classes in any one course he might be subjected to expulsion from the entire school. Furthermore the dissent noted the fact that according to school policies the student was entitled to a warning after 5 days of absence and again after 10 days which he never received.

In one of the more publicized cases,[24] the Supreme Court of Connecticut was called upon to examine a rather complex policy which had been created by the Board of Education of New Milford. The district's attendance policy, set out in an annually distributed student handbook, provided two sets of academic sanctions for students who were absent from school. Course credit was withheld from any student who, without receiving an administrative waiver, was absent from any year long course for more than 24 class periods. In the calculation of the 24 days absent, all class absences were included except absences due to school-sponsored activities or essential administrative business. In addition to the 24 day absentee limit, the course grade of any student whose absence from school was unapproved was subject to a five point reduction for each unapproved absence after the first. In any one marking period, the grade could not, however, be reduced to a grade lower than 50, which was a failing grade. The grade reduction for unexcused absences was, like the 24 maximum absence policy, subject to administrative waiver. The policy of the school board entailed extensive opportunities for

counseling after a student's first confirmed unapproved absence from a class and thereafter.

The stated purpose of the attendance policy was educational rather than disciplinary. A student's disciplinary suspension from school, for reasons unrelated to attendance, was considered an approved rather than an unapproved absence. Such an absence could not result in the diminution of a class grade although it could be counted, unless waived, as part of the 24 maximum absences for class credit. A student's absence from school, whether approved or unapproved, was not a ground for suspension or expulsion.

A student's report card listed for each course grades for each marking period, a final examination grade, a final grade, the amount of credit awarded, and the number of approved and unapproved absences. The report card conspicuously bore the following legend: "A circled grade indicates that the grade was reduced due to unapproved absences." Any report card, thus, disclosed on its face those grades which were affected by the enforcement of the attendance policy.

In the case of the student bringing suit, his report card revealed through the circling of grades in each of his academic courses that due to the district's attendance policy his grades had been reduced. In three of the courses his final grade was lowered from passing to failing. In a fourth course, Architectural Drafting II, where his final grade was passing despite an indicated reduction for unapproved absences, the report card assigned him no credit because of a total of 38 absences, 31 of which were approved and 7 of which were unapproved.

The policy was attacked on four counts. It was charged as being ultra vires or preempted by governing state statutes. It was further considered as being in violation of substantive and procedural due process requirements and of denying equal protection of the laws. At the heart of the issue relating to state statutory concerns was the question of whether or not the policy was truly an academic one. The student charged that its intent was strictly disciplinary and thus that the policy was inconsistent with state statutes governing truancy. The court was unwilling to interpret the policy so narrowly, siding with the school district who had maintained that the intent of the policy was academic. In giving the benefit of the doubt to the school district, the court determined that a nexus can and does exist between classroom presence and grading. In short, the court felt that academic credentials should reflect "more than the product of quizzes, examinations, papers, and classroom participation."[25]

On the constitutional questions, the student argued that the district should meet a strict scrutiny test which the court also rejected. Rather, the court used a rational basis test noting that in order to succeed on these claims the student had to bear the heavy burden of proving that the challenged policy had no reasonable relationship to any legitimate state purpose and that he (the student) had suffered a specific injury as a result of the enforcement of the policy. As to the substantive due process issue, the court ruled that the student had failed on both counts.

Having already ruled the policy's intent as being academic rather than disciplinary, the court relied heavily upon the United States Supreme Court opinion Horowitz[26] and held that dismissals for academic (as opposed to disciplinary) cause do not necessitate

a hearing before the school's decision-making body. Consequently, the only real procedural issue centered on notification. On this point the school board had submitted at the trial court level evidence successfully contradicting the contention of the student that notification was inadequate. The state supreme court dismissed the issue by simply declaring, "In absence of express findings by the trial court, we must conclude that the plaintiff (student) has not met the requirement."[27]

As to the final issue, the student charged that since the policy permits a waiver of grade reductions for unexcused absences, it creates two unequal classes of students. The board of education offered several answers to this argument which in the end became persuasive to the court. First, the board factually denied the premise that the waiver provisions favors students on account of their effort since work may be considered "outstanding" in light of a particular student's past performance. Legally, they noted that the waiver provision imported a reasonable element of flexibility into the assessment of a student's total classroom performance. Finally, they reminded the court that a district-wide policy is more likely to assure equality of treatment for all students than does a policy administered on an ad hoc basis by individual classroom teachers.[28]

CASES OF CATEGORY III

UNEXCUSED ABSENCES - ACADEMIC PENALIZATION

The oldest case[29] in this category involved a regulation promulgated by a Kentucky School District which partially read as follows: "Absences for any other reason and failure to follow the outlined procedure will constitute an unexcused absence, and work will not be allowed to be made up. And, furthermore, five (5) points will be deducted from the total nine-weeks grade for each unexcused absence from each class during the grading period."[30] The district's regulations further provided that absences resulting from suspension would constitute an unexcused absence.

A student within the district was suspended from school on two separate occasions for possession and consumption of alcoholic beverages on school property in violation of school rules. The unexcused-absence rule was not invoked for the first offense, but it was for the second offense. On this occasion he was suspended for four days, and his grades were reduced by five percentage points for each of the four days. As a result, his semester grades were reduced one letter grade in three of the five courses in which he was enrolled.

The student charged that it was beyond the board's authority to impose the grade reduction portion of the penalty for his misbehavior. His position relied upon a state statute which read as follows:

> All pupils admitted to the common schools shall comply with the lawful regulations for the government of the schools. Wilful disobedience or defiance of the authority of the teachers, habitual profanity or vulgarity, or other gross violations of propriety or law constitutes cause for suspension or expulsion from school. The superintendent, principal, or

> head teacher of any school district may expel any pupil for misconduct as defined in this section, but such action shall not be taken until the parent, guardian or other person having legal custody or control of the pupil has had an opportunity to have a hearing before the board. The decision of the board shall be final.[31]

The student's contention was that the state's general assembly had enunciated legislatively the manner in which misbehaving students should be handled and that consequently it was no longer a discretionary matter for the board to decide.

The board of education unpersuasively countered by pointing to another state statute empowering boards of education to "do all things necessary to accomplish the purposes for which it is created"[32] including the adoption of rules and regulations for the conduct of pupils.

In the first of two Illinois cases[33] found within this category, a senior high school student was guilty of two unexcused absences. The school district had in force at the time the following regulation: "Under an unexcused absence, makeup work shall be done without credit, and grades shall be lowered one letter grade per class."[34] During the school quarter in question, the student was enrolled in four courses. The teachers in three of the four courses lowered the student's grade one letter in their courses because of the unexcused absence rule.

The student's position against the policy was grounded in the constitutional argument that his substantive due process rights had been violated. Following the line of thinking in the U.S. Supreme Court case of Goss v. Lopez,[35] he specifically charged that his right to the receipt of grades was being infringed upon which could have the same type of impact on educational and employment opportunities that the impairment

of class attendance was ruled to have violated in Goss. Despite the analogy that was drawn between the effects of pupil expulsion and the reduction of a pupil's grade, the court was reluctant to extend the constitutional protection. Noting that the weight of judicial authority had been to treat grading as being within a teacher's subjective discretion, ruled that the appropriate test was to weigh the severity of the punitive effect of the sanction against the severity of the conduct sanctioned. When the test was applied to the facts of the case before it, the court declared, "We do not find the reduction in plaintiff's grades by one letter for a period of one quarter of the year in three subjects in consequence of two days of truancy to be so harsh as to deprive him of substantive due process."[36] It was further observed by the court that any damage to the plaintiff was rather remote in that the action had not precluded the student from being admitted to the only junior college to which he had sought admission.

It is important to note that the court refused to apply its test to the policy itself since the school district had subsequently changed its policy making that aspect of the case moot. It is also worthy to mention that there was a strong dissenting opinion.[37] In this dissent, Justice Craven following the logic found in several U.S. Supreme Court opinions, declared, "Plaintiff has a constitutional right, and that right was taken away by an arbitrary rule without any semblance of procedural due process. The rule itself was a denial of substantive due process. We are not invited to look at the weight of the interest asserted but only to determine whether the interest sought to be protected is of such a nature as to require protection.[38]

This dissent appeared to find a sympathetic ear in a later Illinois case entitled, Hamer v. Board of Education of Township High School District #113.[39] This particular case involved a student who left school during the lunch period on an emergency matter without advising any teacher or staff member. On the following school day she returned and presented to the school authorities a note from her mother excusing her absence. The student was thereupon informed by an administrative assistant of her school that as she had left the premises without informing either a teacher or staff member her absence was unauthorized and, as punishment, her grade would be reduced by 3% in each of the courses she missed on that day. Some teachers did reduce her grade average as required by the rule. Others refused to do it. The grade reductions reduced her final grade average and did affect her class standing.

The student charged that there was no statutory authority for the reduction of a grade average of a student as a disciplinary sanction and that to do so in the manner prescribed by the school deprived a student of both procedural and substantive due process contrary to the federal and state constitutions. The Board of Education alleged that the complaint failed to state a cause of action and was insufficient in law. It further argued that the student had failed to demonstrate injury resulting from the conduct of which she complained and thus lacked standing to bring the action. The trial court agreed with the Board and dismissed the complaint.

The appellate court noted that the Board and the trial court had placed heavy reliance upon the decision of its sister appellate court in Knight. Specifically it declared,

> We are aware the majority in Knight concluded on the evidence there adduced that a student was not deprived of

> substantive due process by a grade reduction imposed for an unexcused absence. We have also considered the thoughtful dissent in that case. . .(and) it is our view plaintiff is entitled to be heard on the question of whether the grade reduction sanction for unauthorized absence is an approved policy of the Board; what if any, procedural remedies are available to plaintiff before such a serious sanction may be applied; and whether its application arbitrarily and capriciously result in a grade reduction without a subjective determination of a classroom teacher. In our view plaintiff's complaint is sufficient to require appropriate response by the Board and a hearing to determine whether her right to due process has been violated by procedural infirmities or substantively by the application of arbitrary grade reduction penalties having no reasonable relationship to the disciplinary objectives sought to be attained by the Board.[40]

The court also observed that it did not appear that the Board had given specific consideration to disciplinary matters and had simply delegated general authority to its separate school administrators to carry out Board policy by adopting "lawful" rules and regulations in conformance with an unstated Board policy. The appellate court reversed the decision and sent the case back to the trial court.

In 1981 two cases out of the state of Texas were examined by federal courts. The first, Raymon v. Alvord Independent School District,[41] involved a high school student who was penalized three points on her six weeks algebra grade for an unexcused absence. The net result was to reduce her overall grade point average from 95.478 to 95.413, but did not change her class standing. The student charged that the action of the school constituted a deprivation of a vested property and liberty interest without due process of law guaranteed under the Fifth and Fourteenth Amendments to the U.S. Constitution. The district court, without deciding the federal constitutional issue, exercised jurisdiction over pendent state law claims and ordered the three points be restored to the

algebra grade. The court, however, refused to award attorney's fees and the denial was appealed.

The Fifth Circuit Court, obviously upset about the action even being filed in the federal courts, reversed the judgment, ruling that in view of the insubstantial federal question presented, the district court had abused its discretion by adjudicating the claim.

The Amarillo Independent School District in Texas adopted the following policies:

> Make Up Work Following Absences - School work missed may be made up whether an absence is excused or unexcused; however, students readmitted with an unexcused absence will not be given credit for work made up. If a daily or test grade is recorded for the day of absence, the student whose absence is unexcused receives a zero for a grade. If no grade is recorded for the other students no grade will be recorded for the student who is absent.
> Absences for Religious Holiday - Excused absences shall be granted to students for a maximum of 2 days for religious holidays in each school year.[42]

A group of students within the school district who were members of the Church of God found these policies to be in conflict with a fundamental tenet of their church requiring members to abstain from secular activity on seven annual holy days and to attend a seven-day religious convocation on the Feast of Tabernacles. Students of this faith typically missed 10 to 12 days of each school year observing these activities and/or traveling to and from the same. The students collectively brought suit against the school district charging that the absence policy was unconstitutional because: (1) it violated the free exercise of their religion as guaranteed by the First and Fourteenth Amendments to the United States Constitution; (2) it violated the equal protection clause of the Fourteenth Amendment to the United States Constitution by discriminating against the students on

the basis of their religious beliefs, and; (3) it violated the due process clause of the Fourteenth Amendment to the United States Constitution by creating an irrebuttable presumption that the students are absent without justification.

The Board of Education contended that the claims were without merit and suggested that any indirect burden that was imposed on the student's religious beliefs was outweighed by the school district's interest in compelling regular attendance. Furthermore, the Board claimed that the school district's policy was applied to all religions uniformly, and that if the school district made an exception for this group of students, that they would be giving recognition to the holy days of the Church of God in violation of the establishment clause of the First Amendment.

After tracing the applicable judicial history regarding church and state cases, the court applied a series of tests to the case. Finding the belief at issue to be both a true religious belief (belief test) and the school district policy to be a substantial burden upon the free exercise of that belief (burden test), the court then examined the question of whether or not some compelling interest justified the infringement upon the student's First Amendment rights. Looking first to the school district's position that education outweighed a student's religious beliefs, the court summarily rejected this notion ruling that even though the responsibility for the education of its citizens ranked at the apex of the function of a state that this responsibility must yield when the application of a law or regulation significantly burdens the free exercise of religion. On this point the court declared, "This interest, standing alone, does not justify the burden placed on the free exercise of religion."[43] Furthermore it went on to declare, "Moreover, the interest does

not become compelling when coupled with the administrative burden of accommodating the student's religious beliefs."[44] Relying upon administrative and teacher testimony which revealed that there were no complaints or that the amount of make-up work exceeded that routinely required for those absent because of sickness and participation in interscholastic activities, the court did not find an unreasonable administrative burden.

It is interesting to note that the board of education attempted to prove that the impact of the policy upon the students was not substantial. The court refused to accept the argument. On this point the court declared:

> The loss of grades in this case not only imposes a substantial impact upon the Plaintiff's academic record unrelated to their actual level of achievement, but also places a stigma on the students for abiding by their religious belief. This burden is not ameliorated by the make-up work provision. The provision does not require a teacher to evaluate the work made up. It, in fact, directs the teacher to enter a zero for that work. Apart from the obvious effect the policy has on the student's academic average, the policy ignores the fact that the evaluation of a student's work is a critical part of the learning process. Moreover, logic tells us that the policy provides no incentive for a student to make up work missed. Only the most disciplined student would make up work knowing that a grade of zero will be entered.[45]

The final case[46] involved two music teachers in a Missouri High School who had established a course requirement stipulating that the successful completion of their chorus and/or band classes would require participation in scheduled performances. The only acceptable excuse for nonparticipation was a death in the immediate family or by means of a request made to the teachers prior to a scheduled concert or performance.

The student in question was enrolled in both a chorus and band course. Just prior to two scheduled performances involving both the band and the chorus, the student left

for a Christmas vacation with his family to Hawaii. The vacation had been scheduled for over three months. Failing grades and a loss of credit were given in both classes as a consequence of the unexcused absence.

Although evidence was in dispute as to whether or not the student had informed either teacher of his scheduled trip to Hawaii and the fact that he would not attend the performances of the chorus and band, the trial court concluded he had not. The court was further confronted with the contention that compulsory attendance by chorus and band members at programs oriented to the Christmas season amounted to a religious ceremony violative of provisions in the United States and Missouri Constitutions concerning separation of church and state. This argument also failed for lack of substantial evidence.

On appeal, the student raised four additional contentions all of which failed largely to procedural problems with the complaint. These issues included: (1) The finding by the trial court that the teachers had announced in advance the rule for compulsory attendance at performances and that the student had been aware of the rule lacked any evidentiary support; (2) The penalty of a failing mark for nonattendance at a performance was an abuse of "tutorial discretion;" (3) Before the teachers were entitled to assess a grade penalty, the student was entitled to notice and a hearing comporting with due process; and (4) The trial court erroneously relied on matters not in evidence.

OBSERVATIONS AND CONCLUSIONS

The written opinions of the 14 cases reveal several things. First, the very appearance of cases of this type suggests a growing public concern or displeasure with educational policies that provide for or permit academic penalties for the violation of school attendance and disciplinary rules. It is rather safe to assume that the cases which have been adjudicated only represent the tip of the iceberg. No doubt, many other incidents of this same type are being resolved administratively or at the trial court level.

Second, these cases suggest the emergence and concern over two important philosophical issues or questions: Namely, what should grades represent and how should grades be used? The narrow view holds that grades and/or academic credit should strictly represent achievement on traditional academic measures. Furthermore, the results should then be reported unadulterated by other factors such as student attendance or behavior. The more liberal position believes that academic credentials should reflect more than the product of quizzes, examinations, papers, and classroom participation. Rather, grades should properly reveal a combination of a student's behavior, attendance, and classroom performance. Some would charge that this latter view comes about largely because academic penalties or the threat of such constitute one if not the most effective means for public school officials to compel and maintain state mandated attendance and decorum standards. And given the increased disciplinary and attendance problems facing many schools, together with the lack of options for dealing with these obstacles, this approach is one of the few effective tools at the disposal of school officials.

A third observation is that the courts appear terribly hesitant to substitute their judgment, for that of school officials despite some personal sympathy for the plight of students in these circumstances. This seems to be due, in part, to the United State Supreme Court pronouncements in the Horowitz case and the historical reluctance of courts to intervene into matters deemed "academic" in nature.[47]

Absent a clear violation of the free exercise clause of the First Amendment to the United States Constitution or a substantial conflict with an existing state statute, students have consistently lost, thus far, in their judicial efforts to overcome the effects of these types of school policies. Only in one instance has a court just simply overturned such a policy as being unreasonable and outside the scope of a school board's authority. The Katzman[48] decision which found a Pennsylvania school district's policy to be an illegal application of the Board's discretion because it misrepresented achievement is clearly a minority judicial view at this time. However, this is one case and court that clearly aligned itself with the narrower philosophical view as to what grades should represent.

IMPLICATIONS FOR PRACTICE

Given the current position of courts around the country what then are the implications for practice with respect to the use of academic penalties for violations of school attendance and disciplinary rules? Four recommendations emerged from this study. They include:

1. Schools and school districts should recognize that the use of automatic academic penalties for the violation of school attendance and disciplinary rules is becoming increasingly controversial and subject to litigation.

2. Absent state statutes providing legislative direction regarding the meaning that academic grades should convey, local school districts should consider adopting a policy and/or statement of philosophy that will give direction to and help shape administrative and teacher behavior in this arena.

3. School officials who choose to utilize policies that reduce grades and/or credit for nonacademic behavior may reduce the threat of such policies being found illegal by:

   a. Making sure such policies do not conflict with established state statutes governing truancy, attendance, grading, student exclusion, and other related subjects.

   b. Not allowing such policies to interfere with the reasonable practice of religious beliefs.

   c. Linking such policies with an academic belief or philosophy that views the use of grades in a context broader than mere reliance upon standard academic measures.

4. Those who oppose the practice of automatically imposing academic penalties for violation of school attendance measures and disciplinary regulations may find reform through legislative enactments and/or local school boards regulations a more promising solution than through judicial intervention.

FOOTNOTES

1. See the Annual Gallup Poll of the Public's Attitudes Toward the Public School in the September issues of the Phi Delta Kappan.
2. Matter of Blackman v. Brown, 419 N.Y.S.2d 796, 798 (1978).
3. Id. at 799.
4. 419 F. Supp. 1200 (1976).
5. Id. at 1202.
6. Id.
7. Id. at 1203.
8. Id.
9. Katzman v. Cumberland Valley School District, 479 A.2d 671 (1984).
10. Id. at 672.
11. Id. at 673.
12. Id. at 674.
13. Id. at 674-675.
14. 424 N.E.2d 737 (1981).
15. New Braunfels Independent School District v. Armke, 658 S.W.2d 330 (1983).
16. Id. at 331.
17. 585 P.2d 935 (1978).
18. Id. at 936.
19. Id. at 937.
20. Williams v. Board of Education, 626 S.W.2d 361 (1982).
21. Id. at 362.

22. Id. at 363.

23. Id. at 363-364.

24. Campbell v. Board of Education of New Milford, 475 A.2d 289 (1984). See "Academic or Disciplinary Decisions: When is Due Process Required? Campbell v. Board of Education," 6 U Bridgeport LR 391-430 1985.

25. Id. at 294.

26. Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978).

27. Id. at 297.

28. Id. at 298.

29. Dorsey v. Bale, 521 S.W.2d 76 (1975).

30. Id. at 77.

31. Id. at 78.

32. Id.

33. Knight v. Board of Education of Tri-Point Community Unit School District No. 6J, 348 N.E.2d 299 (1976).

34. Id. at 301.

35. Goss v. Lopez, 419 U.S. 565 (1976).

36. 384 N.E.2d at 303.

37. Id. at 305-306.

38. Id. at 305.

39. 383 N.E.2d 231 (1978).

40. Id. at 234.

41. 639 F.2d 257 (5th Cir. 1981).

42. See Church of God v. Amarillo Independent School District, 511 F.Supp. 613, 614, 615 (1981).

43. Id. at 618.

44. Id.

45. Id. at 617.

46. R. J. J. by Johnson V. Shineman, 658 S.W.2d 910 (1983).

47. In addressing this topic, the U.S. Supreme Court in Horowitz wrote: "Since the issue first arose 50 years ago, state and lower federal courts have recognized that there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter. Thus, in Barnard v. Inhabitants of Shelburne, 216 Mass 19, 102 N.E. 1095 (1913), the Supreme Judicial Court of Massachusetts rejected an argument, based on several earlier decisions requiring a hearing in disciplinary contexts, that school officials must also grant a hearing before excluding a student on academic grounds. . .A similar conclusion has been reached by the other state courts to consider the issue. . .Indeed, until the instant decision by the Court of Appeals for the Eighth Circuit, the Courts of Appeals were also unanimous in concluding that dismissals for academic (as opposed to disciplinary) cause do not necessitate a hearing before the school's decision-making body.
Reason, furthermore, clearly supports the perception of these decisions. A school is an academic institution, not a courtroom or administrative hearing room. . .Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement. . .Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision.
'Judicial interposition in the operation of the public school system of the Nation raises problems requiring cure and restraint. . .By and large, public education in our Nation is committed to the control of the state and local authorities [Epperson v. Arkansas, 393 V.S. 97, 104 (1968)]' We see no reason to intrude on that historic control in this case. 435 U.S. at 87-91.

48. Op. Cit.